U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 2 6 2005
LIN 03 185 52030

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an IT consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Citizenship and Immigration Services (CIS) regulations at 8 C.F.R. § 204.5(g)(2) state, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 4, 2002. On the Form ETA 750B, signed by the beneficiary under penalty of perjury on May 19, 2003, the beneficiary claimed to have begun working for the petitioner in April 2003. As of the filing date, the beneficiary lived and worked in Texas. The proffered wage as stated on the Form ETA 750 is $65,000 per year. On the Form I-140 petition, filed on May 22, 2003, the salary is listed as $60,000 per year. We consider the proffered wage to be the higher wage listed on the Form ETA 750, because that is the wage certified by the Department of Labor. A basic purpose of labor certification (protecting wages) would be undermined if an employer could simply lower this wage after obtaining a labor certification, without obtaining a modified labor certification or otherwise notifying the Department of Labor.

We note that the petitioner had originally obtained the labor certification on behalf of a different alien, named [redacted] who began working for the petitioner in December 2001. The petitioner never filed a petition for that alien, and substituted the present beneficiary for the alien originally named on the labor certification.

The petitioner provided the following information on its I-140 petition form:

Date Established	1998	Gross Annual Income	$3.4 million
Current # of employees	35	Net Annual Income	[blank]

The Form I-140 advises that failure to *completely* fill out the form could result in denial of the petition. The petitioner did not explain why the space marked "Net Annual Income" was left blank.

In support of the petition, the petitioner submitted a copy of its 2001 Form 1120S Income Tax Return for an S Corporation, containing the following information:

Gross receipts	$3,281,794	Ordinary income	$137,938
Total income	689,961	Cost of labor	1,311,270
Compensation of officers	94,503	Cash assets at end of year	(49,878)
Salaries and wages	[blank]	Current liabilities	109,998

The director issued a request for evidence on November 4, 2003. This notice reads, in part:

> The petitioner must submit evidence to establish that it had the financial ability to pay the offered wage as of April 4, 2002, **and continues to have such ability**. Such evidence must include your latest annual report, your latest U.S. tax return, or audited financial statements.
> . . .
>
> Please submit a signed copy of the petitioner's 2002 corporate income tax return.
>
> Additionally, the petitioner must submit a complete list of the immigrant petitions it currently has pending with the Bureau, to include the offered wage for each.

(Emphasis in original.) In response, counsel provides a list of five aliens for whom the petitioner has immigrant petitions pending. Each of these aliens has a listed proffered salary between $55,000 and $60,000 per year, for a total of $287,000 per year in combined salaries. (As noted above, we consider this beneficiary's proffered wage to be $65,000 per year, because this was the amount represented to the Department of Labor.

The petitioner submits a copy of its 2002 Form 1120S return, containing the following information:

Gross receipts	$2,997,318	Ordinary income	$32,606
Total income	553,895	Cost of labor	1,790,415
Compensation of officers	[blank]	Cash assets at end of year	3,599
Salaries and wages	[blank]	Current liabilities	160,128

The director denied the petition on March 25, 2004, stating that the petitioner's ordinary income for 2002 was "significantly lower than the offered wage" for the beneficiary, let alone for all five aliens for whom petitions were pending. The director also noted that the petitioner did not employ the beneficiary in 2002, which indicates that the petitioner's expenses for that year did not include the beneficiary's salary.

On appeal, counsel asserts: "a company's profit for a taxable year is an incomplete source for determining whether a company has the financial ability to pay the wages offered to a beneficiary." Counsel states that the 2002 tax return "showed a profit of $32,606 after all expenses, including employee payroll." The tax returns, however, do not reflect *any* "employee payroll." The space labeled "Salaries and wages" is blank on both returns. The returns, instead, reflect only "Cost of labor," which indicates that the petitioner relied upon contract labor, rather than direct employees, in 2001 and 2002. This is reinforced by statements and documentation submitted on appeal. We shall return to the issue of contract labor later in this decision.

Counsel states: "In evaluating a company's financial ability to pay, the Service should look at various sources apart from the corporate income tax return. In this case the corporate tax returns alone prove a financial ability to pay when they are evaluated correctly by looking at whether the salary was paid for the 'position' rather than whether it was paid to the specific 'beneficiary' listed on the I-140 petition." As noted above, the petitioner did not report any wages paid to "employees" in 2002. The petitioner paid for "labor," but the lump sum of total labor cost payments does not demonstrate that the beneficiary's specific position was filled and fully paid in 2002.

Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Counsel states that the petitioner's "corporate bank statement for the year end 2002 shows a balance of $177,284.07, the corporate bank statement for the year end 2003 shows a balance of $68,710.86, and the corporate bank statement for January 30, 2004 shows a balance of $123,487.90." Counsel's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

Also, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not shown on its tax return. The petitioner's 2002 tax return, which the director relied upon to determine the petitioner's available assets, shows only $3,599 in cash assets as of the end of calendar year 2002. The petitioner does not explain why the figures in the bank statement and the tax return differ by a factor of almost 50. Also on the 2002 tax return, the petitioner claimed *total* assets of only $168,794, almost all of which took the form of loans to shareholders. Furthermore, the tax return, unlike the bank statements, shows liabilities in addition to assets. The petitioner's reported current liabilities at the end of 2002 totaled over $160,000, which would absorb almost 90% of the cash in the petitioner's bank account at the time.

Counsel argues that another worker held the beneficiary's position during 2002 and 2003, and therefore the petitioner must have had, and did have, the ability to compensate a worker in that position. Vijay Vallabhaneni, president and CEO of the petitioning company, states that the company has heretofore used the services of subcontractors, but "by hiring directly we believe we can save close to 25%" of labor costs. He adds: "We intend to replace these subcontractors with the new hires that we are pursuing." Counsel states:

> [T]he position was originally going to be filled by [redacted] left [the petitioner] soon after the labor certification was filed. The company then temporarily filled

> the position by subcontracting from another company. In so doing, the company employed Priya Patnaik for a temporary period of time from April 2002 until July 2003 when the [beneficiary] then assumed the position. Therefore, the company offered a position to [the beneficiary] which is the same full-time, permanent position which was certified by the Department of Labor on behalf of [redacted]
>
> The company has historically employed some independent contractors at a very high rate and the intention has been to replace the highly paid independent contractors with full-time, permanent employees. . . . While this particular beneficiary was not working for the company during 2002 and all of 2003, the person that he is being petitioned for to replace was employed and paid more than the wage stated on the labor certification application. Specifically, he is replacing [redacted] company was paid through the subcontractor agreement at a rate of $127,322.53 for the period of April 2002 until July 2003. [The beneficiary] was then hired by [the petitioner] in July 2003 to full the permanent position.

The petitioner submits a copy of a "Find Report," indicating that the petitioner issued monthly checks to [redacted] from June 27, 2002 to June 25, 2003. This page does not indicate the amount of the checks. Another page of the report shows monthly "Accounts Payable" for "Computer Sub contracting." The amounts add up to $122,322.53, the amount claimed above by counsel, but the report does not link directly link these payments to [redacted] or to the never-identified company that employed that individual.

Neither counsel nor the petitioner specifies the number of contractors that the petitioner has employed at any one time. The petitioner does not demonstrate that [redacted] performed the same duties as those set forth in the Form ETA 750. If [redacted] performed other kinds of work, then the beneficiary will not be replacing that individual's function in the business, and any funds used to compensate Priya Patnaik cannot be shown as proof of the petitioner's ability to pay.

The petitioner submits copies of Form W-2 Wage and Tax Statements, indicating that the petitioner paid the beneficiary $30,004 in 2003. Counsel states that the Form W-2 shows payment "for services from July 2003 until the end of December 2003." This amount is consistent with half a year of payments to the beneficiary at an annual rate of $60,000. Apart from the fact that $60,000 is less than the proffered wage shown on the labor certification, we note that the new claim that the beneficiary began working for the petitioner in July 2003 does not match the beneficiary's earlier statement on Form ETA 750B. On that form, the beneficiary indicated that he began working for the petitioner in *April* 2003. The beneficiary executed and signed this form on May 19, 2003. On May 22, 2003, the petitioner submitted the beneficiary's Form ETA 750B as part of its petition on the beneficiary's behalf. An official of the petitioning company signed the Form I-140, thereby attesting, under penalty of perjury, that the information contained in the petition was true.[1]

Assuming that the Form W-2 is authentic, two possible conclusions come to mind: (1) The petitioner has been paying the beneficiary an amount significantly less than the proffered wage, and the new claim that the petitioner hired the beneficiary in July 2003 was fabricated in order to explain why the beneficiary received only six months' worth of wages in 2003; or (2) the beneficiary's employment with the petitioner has been intermittent rather than continuous, and as a result the beneficiary worked only six months during the last nine

[1] We note that, on March 6, 2004, the beneficiary filed a Form I-485 adjustment application. With this application, the beneficiary submitted Form G-325A, Biographic Information. On that form, the beneficiary indicated that he had worked for the petitioner since May 2003.

months of 2003. (If the petitioner hired the beneficiary in April 2003, then nine months salary at the proffered wage would be at least $45,000.) Both of these scenarios cast doubt on the petitioner's ability to pay the full proffered wage originally offered to the beneficiary.

Counsel's new, and repeated, claim that the petitioner hired the beneficiary in July 2003 cannot be afforded any credibility in light of the petitioner's and the beneficiary's original claims. Similar doubts attach to the documents purporting to show payments to the beneficiary's predecessor [redacted] until late June 2003. 8 C.F.R. § 1003.102 states that a practitioner engages in frivolous behavior when he or she knows or reasonably should have known that his or her actions lack an arguable basis in law or in fact. In this instance, counsel's name appears on the Form ETA-750B Statement of Qualifications, which was prepared and submitted *before* July 2003, and which indicates that the beneficiary was *already* working for the petitioner at that time. Thus, counsel knew, or reasonably should have known, that the petitioner did not hire the beneficiary in July 2003 as claimed on appeal, and that, therefore, such a claim had no basis in fact.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988).

These credibility issues are especially salient given that some of the petitioner's key claims are unsupported by reliable documentary evidence. They are further compounded by the fact that the petitioner's tax return shows that the petitioner had only $3,599 in cash assets as of December 31, 2002, but the petitioner's bank statements indicate the petitioner had $177,284.07 in the bank that day – an amount which exceeds the petitioner's *total assets* claimed on the tax return. The petitioner has provided all of these figures, but has provided absolutely no explanation as to why the petitioner's actual cash holdings were almost fifty times the "cash assets" claimed on the tax return.

Counsel argues: "the number of I-140 petitions currently pending at the Service Center is not indicative of whether the company has the financial ability to pay the beneficiary." According to documents provided by the petitioner, the petitioner has committed to paying these five aliens $287,000 per year (actually, at least $292,000, factoring in the actual proffered wage shown on the beneficiary's labor certification). The petitioner must either show its ability to pay this full amount, or concede its inability to pay the proffered wage to at least some of these aliens.

Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to all beneficiaries are realistic, and therefore that it has had the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The petitioner, in this proceeding, has not documented that it has paid at least $292,000 per year to identified contractors who have been performing essentially the same duties that will be assigned to the beneficiaries. Given the petitioner's reported payments of over a million dollars in "labor costs" each year, the petitioner's explanation is plausible on its face, but insufficiently supported by the available evidence. The credibility issues arising from the petitioner's inconsistent claims regarding the beneficiary's hiring date do not inspire confidence that the petitioner's uncorroborated claims are probably true.

We note that, on June 9, 2004, the petitioner filed a new petition (receipt number LIN 04 182 50770) on the beneficiary's behalf. The new petition has not yet been adjudicated. We further note that the new petition relies on the same labor certification, and therefore the same filing date (April 4, 2002) applies. The filing of a second petition, relying on the same labor certification, does not change the calculation date for ability to pay.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.